STATE OF MICHIGAN
IN THE SUPREME COURT

SUSAN MOORE, as Guardian and Conservator of the ESTATE OF JOSEPH DANIEL VELEZ, JR, an Incapacitated Individual,

Plaintiff-Appellee,

v.

RICHARD SHAFER; KAREN SHAFER; R SHAFER BUILDERS; RICHARD N. SHAFER, Trustee of Revocable Living Trust Agreement dated 12/14/89; KAREN J. SHAFER, Trustee of Revocable Living Trust Agreement dated 12/14/89

Defendants-Appellants,

and

HENSLEY MFG, INC., a Michigan corporation,

Defendant.

SC No. 161098

COA No. 345101

Macomb CC: 17-002389-NO

APPELLANTS RICHARD SHAFER, KAREN SHAFER, R SHAFER BUILDERS, RICHARD N. SHAFER AS TRUSTEE AND KAREN J. SHAFER AS TRUSTEE'S REPLY IN SUPPORT OF THEIR APPLICATION FOR LEAVE TO APPEAL FROM DECISION OF THE MICHIGAN COURT OF APPEALS

ORAL ARGUMENT REQUESTED

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I. "Retained control" is a red herring.

Appellee Susan Moore's ("Moore") Answer confuses the legal theories that were at issue in this case and concludes that premises liability may lie against a general contractor who is alleged to have failed to protect its subcontractor's workers from an open and obvious condition that did not have special aspects. It is ironic that Moore relies largely on this Court's decision in *Perkoviq v Decor Homes-Lake Shore Pointe, Ltd.*, which in fact explained that the opposite is true of Michigan law:

> The Court of Appeals seems to have confused general contractor liability with the liability of a possessor of premises. In explaining its conclusion that defendant could be liable on a premises liability theory, the Court used analysis that was irrelevant to that theory and would be applicable only to a claim against a general contractor. It stated:
>
> > The evidence presented, including the contract and deposition testimony, is conflicting as to who was responsible for providing safety equipment and ensuring its use; either the general contractor, the subcontractor or both.
>
> *The fact that defendant may have additional duties in its role as general contractor, however, does not alter the nature of the duties owed by virtue of its ownership of the premises*.
>
> * * * * *
>
> As noted above, plaintiff's *other* claim was that defendant, as general contractor, did not take appropriate measures to insure the safety of the job site. However, the lower courts have held that this case does not come within the exceptions [i.e., the "common work area doctrine"] to the general principle that general contractors are not liable for injuries to subcontractors' employees. Plaintiff has not appealed that determination, and it is not before us.

466 Mich 11, 19, n 4; 643 NW2d 212 (2002) (emphasis added).

Moore ignores this part of *Perkoviq's* holding and instead cites to cases standing for the proposition that a general contractor that retains control over the work of a subcontractor can be liable for injuries to the subcontractor's workers. But that is merely another way of saying that Michigan courts continue to recognize the common work area doctrine developed in *Funk v General Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974). The Court of Appeals in the instant case, however, already correctly affirmed the

trial court's dismissal of Moore's common work area claims on the basis that Moore did not establish the four required elements discussed in *Funk* and its progeny, and Moore has not sought leave to appeal or cross-appeal that or any part of the Court of Appeals decision. The issue, therefore, is not properly raised here, where Appellants' ("Shafer") application concerns only the issue of Moore's premises liability claim. *See Tyra v Organ Procurement Agency*, 498 Mich 68, 88-89; 869 NW2d 213 (2015) (explaining that "appellees who have not cross-appealed may not obtain a decision more favorable to them than was rendered by the Court of Appeals").

Moore may wish to argue that Michigan law recognizes a "retained control doctrine" that is somehow distinct from the common work area doctrine and that she therefore need not have established the four common work area elements. But this Court already has foreclosed such an argument:

> [T]hese two doctrines are not two distinct and separate exceptions, rather only one – the "common work area doctrine" – is an exception to the general rule of nonliability for the negligent acts of independent subcontractors and their employees. Thus, only when the *Funk* four-part "common work area" test is satisfied may an injured employee of an independent subcontractor sue the general contractor for that contractor's alleged negligence.

Ormsby v Capital Welding, Inc, 471 Mich 45, 49; 684 NW2d 320 (2004). Furthermore, Moore did not argue in the trial court that she pled a retained control claim that was distinct from her common work area claim, and she consequently waived any such argument for appellate purposes in any event. *See Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993) (holding that issues raised for the first time on appeal are not subject to review).

Accordingly, whether or not Shafer retained control over the roofing job on which Moore's ward was injured, that fact is utterly immaterial to any issue in this application.

II. The new expanded premises liability duties created by the Court of Appeals decision apply broadly.

Moore also argues that the Court of Appeals majority decision does not significantly enlarge the premises liability duties owed by landowners and possessors in Michigan because the decision applies only

to general contractors. But that reading of the decision absolutely cannot be reconciled with *Perkoviq*'s holding: "The fact that defendant may have additional duties in its role as general contractor, however, does not alter the nature of the duties owed by virtue of its ownership of the premises." 466 Mich at 19. Put differently, the identity of the landowner or possessor does not have the slightest thing to do with the nature of his or her premises liability duties. Instead, there are general duties that are owed equally by all landowners and possessors, no matter their level of sophistication, whether they are commercial operators or residential homeowners. The Court of Appeals majority decision, therefore, to extend those general duties to where the landowner or possessor is or should be aware that an invitee may not protect him or herself from an open and obvious condition, is now a duty imposed upon each and every landowner and possessor in this state. In addition to being contrary, as will be discussed hereafter, to the special aspects doctrine from *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001), it simply is bad public policy, bordering on the absurd, to create a tort that can be brought against an elderly widowed homeowner who allegedly should have seen that her professional roofer failed to protect himself before falling off her ordinary roof. Leave to appeal should be granted to restore common sense to Michigan's premises liability doctrine.

III. Moore's attempt to distinguish *Mann* is not persuasive.

Moore also argues that this Court's holding in *Mann v Shusteric Enterprises, Inc*, 470 Mich 320; 683 NW2d 573 (2004) was only that a landowner or possessor does not owe a duty to protect an *intoxicated* invitee from an open and obvious condition that does not have special aspects. *Mann*, argues Moore, does not preclude imposing a duty on a landowner or possessor who should know that an invitee may not take adequate safety precautions for any reason other than consuming too much alcohol. Not only would this purported distinction serve no legitimate policy purpose, but the *Mann* decision on its face cannot be understood so narrowly.

One of the issues the *Mann* Court addressed on appeal was a defense objection to a jury instruction on M Civ JI 19.03, which stated:

> A possessor must warn the invitee of dangers that are known or that should have been known to the possessor unless those dangers are open and obvious. However, a possessor must warn an invitee of an open and obvious danger if the possessor should expect that an invitee will not discover the danger or will not protect [himself] against it.

Mann, 470 Mich at 324-325 n 3. Critically, this Court found that jury instruction to be contrary to the special aspects doctrine recognized in *Lugo, supra*:

> [W]e believe that § 19.03 is an inaccurate instruction. Under *Lugo,* a premises possessor must protect an invitee against an "open and obvious" danger only if such danger contains "special aspects" that make it "unreasonably dangerous." *Lugo, supra* at 517, 629 N.W.2d 384. Because "special aspects" are not defined with regard to whether a premises possessor should expect that an invitee will not "discover the danger" or will not "protect against it," § 19.03, but rather by whether an otherwise "open and obvious" danger is "effectively unavoidable" or "imposes an unreasonably high risk of severe harm" to an invitee, *Lugo, supra* at 518, 629 N.W.2d 384, we believe that § 19.03 sets forth an inaccurate statement of premises liability law.

Mann, 470 Mich at 331-332. In other words, the analysis categorically has nothing do with whether the landowner or possessor knows or should know that an invitee is unlikely to protect against an open and obvious condition. Moore's argument that the existence of a duty depends on the reason why the invitee is unlikely to protect him or herself, like the former M Civ JI 19.03, is "an inaccurate statement of premises liability law." *See Mann*, 470 Mich at 332.

Rather, *Mann* is clear that the only question is "whether an otherwise 'open and obvious' danger 'imposes an unreasonably high risk of severe harm' to an invitee." *Id.* at 331-332.[1] To answer this question as applied to the record evidence in the instant case, the Court's decision in *Perkoviq, supra* could not be more on point. The issue in that case was whether a general contractor owed a duty to protect a

[1] There is no dispute that the other exception discussed in *Lugo* and *Mann* – where a condition is "effectively unavoidable" – is not implicated here.

subcontractor's worker from falling off an unguarded sloped 20-foot-high roof covered in ice and snow. *Perkoviq*, 466 Mich at 12-13, 19-20. The Court held there was no duty as a matter of law:

> In short, plaintiff has presented no evidence that the condition of the roof was unreasonably dangerous for purposes of premises liability. The mere presence of ice, snow, or frost on a sloped rooftop generally does not create an unreasonably dangerous condition. Plaintiff has not articulated any action that could reasonably be expected of possessors of land in Michigan to protect against the obvious dangers that arise when snow, ice, or frost accumulate on sloped rooftops. To avoid summary disposition on this type of claim, a plaintiff must present evidence of "special aspects" of the condition that differentiate it from the typical sloped rooftop containing ice, snow, or frost. *Lugo,* supra.

Perkoviq, 466 Mich at 19-20. If a wintery sloped 20-foot-high roof does not have special aspects, then *a fortiori* Moore cannot recover under a premises liability theory for her ward's fall from Shafer's flat 20-foot-high roof in the summer. The Court should reject Moore's invitation to overrule *Mann* and *Perkoviq*, and instead should grant leave to appeal.

IV. Moore failed to establish causation.

Assuming *arguendo* that the Court of Appeals was correct that all landowners and possessors in Michigan owe a duty to protect invitees they know may not take adequate safety precautions, one of the next questions in this case would be: what is the exact "action that could reasonably be expected" of a homeowner to protect his or her commercial roofers "against the obvious dangers that arise" when working on an ordinary roof? *See id.* It would be an incredible duty for the homeowner to be responsible to actually install fall protection on his or her roof for the benefit of the roofers or even to advise the roofer as to the specific fall protection that is appropriate for his or her roof. At the very most, perhaps the homeowner could reasonably be expected to inquire of the roofer whether the roofer's safety measures are sufficient, but certainly not more than that. If such a duty existed, then in order to establish causation in this case, Moore would have to prove that had Shafer made that inquiry of the roofing subcontractor, then Moore's ward would not have subsequently fallen. But because the record is completely devoid of evidence that the roofers would have done anything differently even had Shafer asked about their safety measures, Moore

cannot make out the causation element of her claim. In fact, there is not even any evidence as to why or how Moore's ward fell, without which all of Moore's cases about causation being a jury question are simply inapposite.

In the first case discussed by Moore, *Stenzel v Best Buy Co*, 318 Mich App 411, 416; 898 NW2d 236 (2016), the Court of Appeals observed that there was extensive evidence about how the accident happened, and there was no plausible explanation other than that it was caused by defendants' defective appliance:

> [T]he record reflects that a significant quantity of water leaked from the refrigerator and onto the floor. While cleaning that water up to prevent water damage, Stenzel slipped in her sunroom on what she described as "wet." Although she was not certain whether the wetness came from water on her foot or whether it came from water on the floor, she was absolutely certain that it was from one or the other. Her testimony further established that she was barefoot while cleaning up and that she had attempted to clean the water up by laying down towels, which she then dragged through the sunroom in a lattice laundry basket.

"Accordingly," the Court of Appeals concluded, "on this record, but for Best Buy's and Samsung's alleged negligence, Stenzel would not have had water on either her feet or the floor in the sunroom, and she would not have fallen while cleaning up the water caused by the defective refrigerator." *Id.* at 417. In this case, on the other hand, Moore has no record facts whatsoever about her ward's fall, nor any from which to conclude that but for Shafer's alleged failure to inquire about the roofers' safety measures, the fall would not have occurred.

In Moore's next case, *Mills v AB Dick Co*, 26 Mich App 164; 182 NW2d 79 (1970), the defendants argued that it was speculative to assume that their installation of a handrail would have prevented the plaintiff's fall down their staircase. But the plaintiff in that case had given specific testimony about exactly how he fell, and it was in the exact location where he would have grabbed on to a handrail, had there been

one. *Id.* at 169. Here, as discussed, there was zero evidence of how Moore's ward fell, nor any evidence linking that fall to Shafer's alleged failure to ask the roofers about their fall protection.[2]

Moore's final case is *Skinner v Square D Co*, 445 Mich 153; 516 NW2d 475 (1994), a decision that in fact strongly supports Shafer's position. *Skinner* involved a fatal accident in a tool and die shop, and "[b]ecause no one was present in the shop with the decedent immediately before the accident, the plaintiffs had to rely on circumstantial evidence to establish that the alleged defective switch was the cause in fact of the decedent's death." 445 Mich at 163. The Court noted that circumstantial evidence can be sufficient to establish causation. *Id.* "We want to make clear what it means to provide circumstantial evidence that permits a reasonable inference of causation," the Court wrote:

> [A]t a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.

Id. at 164-165.

The *Skinner* Court recognized that in an earlier case, *Schedlbauer v Chris-Craft Corp*, 381 Mich 217; 160 NW2d 889 (1968), it had held circumstantial proof was sufficient to establish causation. The proofs in *Schedlbauer* included:

> the plaintiff's testimony that, while the boat had operated without incident in the past, immediately before the explosion, the engine started to "run rough"; the plaintiff's expert testimony that if there had been a leak in the fuel pump, the engine would not turn off, but it would "run roughly"; the expert's opinion that the gasoline entered the bilge area through the fuel pump and caused the explosion; the expert's view that if gasoline had entered the bilge area in any other way, the engine would have necessarily shut off automatically during the explosion; and the plaintiff's testimony that during the explosion the motor continued to run until he manually turned it off.

[2] Furthermore, the Court of Appeals decision in *Mills* is not precedential in any event, pursuant to MCR 7.215(J)(1).

See Skinner, 445 Mich at 167 (internal footnotes omitted). On the basis of that overwhelming circumstantial evidence, the Court found that the plaintiff had met his burden of proving causation. *Id.*

In contrast, the *Skinner* Court discussed its decision in *Jordan v Whiting Corp*, 396 Mich 145; 240 NW2d 468 (1976), which featured a claim arising out of a fatal construction accident to which there were no eyewitnesses. The *Jordan* Court noted that the "plaintiff was unable to offer any evidence establishing where the decedent was located on the crane or what he may have been touching when he was electrocuted. The sole evidence presented consisted of testimony from the plaintiff's expert regarding purely hypothetical situations." *See Skinner*, 445 Mich at 169. On the basis of this lack of evidence about how the accident actually occurred, the Court concluded that plaintiff failed to establish causation. *See id.*

Similarly, *Skinner* analyzed the *Howe v Michigan CR Co*, 236 Mich 577; 211 NW 111 (1926) case, which involved a railroad employee's fatal fall from a bridge that, again, had no eyewitnesses. The plaintiff argued that "the logical and reasonable inference as to the cause of [the employee's] death is that he alighted from the right-hand rear step of the way car, where there was available to him about 24 7/8 inches of landing space; that this was not sufficient, and as he stepped from the car he fell over the edge of the bridge." *Id.* at 583. There was corroborating evidence from the medical examiner that the fall happened because of the insufficient space between the rail and the bridge. *Id.* The Court, however, held:

> This is one possible explanation of the manner decedent came to his death. It is by no means the only one. No eye saw him after he left the car. No one even knows from which side of the car he left. Is it not just as possible that he stumbled or slipped from the platform or steps of the car and fell into the river? If he did, the space afforded him for walking between the car and the edge of the bridge had nothing to do with it. One theory is as reasonable as the other. Additional ones might be and have been advanced, but the jury should not be permitted to conjecture that he fell from one cause and not from another.

Skinner, 455 Mich at 170 (quoting *Howe*, 236 Mich at 583-584).

In *Skinner* itself, the Court concluded that the circumstantial evidence relating to the tool and die shop accident at issue was less like that in *Schedlbauer* and more like that in *Jordan* and *Howe*. *Skinner*,

455 Mich at 170-171. The Court noted that the plaintiff's causation theory required the jury to make certain factual findings, but there was insufficient record evidence from which the jury could reasonably make those findings. *Id.* at 172. "Of course," the Court wrote, "the plaintiffs' offered scenario is a *possibility*. However, so are countless others. As explained above, causation theories that are mere possibilities or, at most, equally as probable as other theories do not justify denying defendant's motion for summary judgment." *Id.* at 172-173 (emphasis in original).

Here, like in *Jordan*, *Howe* and *Skinner*, there was no evidence as to how or why the accident happened. Moore's ward is incompetent to give testimony, and there were no other witnesses to his fall or any other evidence as to what caused the fall. Moore, as discussed, is forced to argue that had Shafer satisfied its duty by asking the roofers about their safety measures, the accident would not have happened. That, potentially, is a possibility. But it would require the jury to find that the roofers would have responded to Shafer's question by implementing different safety precautions, and that those different precautions would have prevented Moore's ward's fall, despite a complete lack of evidence on either issue. Rather, like the plaintiffs in *Jordan*, *Howe* and *Skinner*, because Moore was unable to offer any record facts establishing how her ward fell or what the roofing subcontractor would have done differently had Shafer asked about fall protection, her theory is based on "purely hypothetical situations" and should be rejected. *See Skinner*, 445 Mich at 169

V. Conclusion.

For the reasons stated in Shafer's application and above, Shafer respectfully requests that this Court grant leave to appeal the Court of Appeals' January 30, 2020 decision reversing the Circuit Court's grant of Shafer's motion for summary disposition. Alternatively, Shafer asks the Court to enter an order pursuant to MCR 7.305(H)(1) peremptorily reversing the Court of Appeals decision and reinstating the trial court's decision.

Respectfully submitted,

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Dated: June 18, 2020

PROOF OF SERVICE

I hereby certify that on the 18th day of June, 2020, Appellants Richard Shafer, Karen Shafer, R Shafer Builders, Richard N. Shafer as Trustee and Karen J Shafer as Trustee's Reply in Support of their Application for Leave to Appeal from the Decision of the Michigan Court of Appeals and this Proof of Service were electronically filed using the MiFile and service system of the Michigan Supreme Court which will serve counsel of record.

/s/ Jill M. Stern
Jill M. Stern